In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1056

STUART SCHERR AND STEVEN GOODMAN, PETITIONERS

v.

UNIVERSAL MATCH CORPORATION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 24–35) is reported at 297 F. Supp. 107. The opinion of the court of appeals (Pet. App. 12–23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1969. The petition for a writ of certiorari was filed on January 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

376-054—70

QUESTION PRESENTED

Whether the United States has exclusive copyright interests in a military statue petitioners made in the regular course of their military service, at government expense and using government materials, facilities and personnel.

STATEMENT

Petitioners Scherr and Goodman, two ex-servicemen, brought this action for copyright infringement against respondent Universal Match Corporation, contending that Universal had infringed their copyright in a statue of an Army infantryman by reproducing and selling imitative copies of it on match book covers (Appellants' App. 16–17).[1] The United States, which had consented to the copying, intervened as a party defendant in the trial court (Appellees' App. 2).

The statue was built by petitioners and other servicemen while on active duty at the Army's Infantry Park, Fort Dix, New Jersey, pursuant to a formal government-commissioned project (Appellees' App. 16–34, 55; Ex. 8). Since its unveiling, it has at all times been on public view there (Exs. C, 10, 12; Appellees' App. 16). The project originated as follows: In the fall of 1957, petitioner Goodman began to model a small clay figure of a soldier in his spare time at Fort Dix (Appellees' App. 45).[2] The unfinished figure was

[1] References are to appellants' and appellees' appendices and to the exhibits ("Exs.") filed in the court of appeals and lodged with the Clerk of this Court.

[2] In civilian life, petitioners Goodman and Scherr had had some training and experience in the fine arts although neither

admired by an officer at the base, who suggested that Goodman complete it and show it to General Heintges, the deputy base commander (Appellees' App. 46). Goodman then finished this small figure during duty hours (*ibid.*), and showed it to General Heintges. The General raised the possibility of constructing a large statue on this model to serve as a symbol of the base (Appellees' App. 46, 49). After a series of meetings between petitioners and General Heintges, petitioners agreed voluntarily to build the statue for the army on the understanding that they would be relieved of their other military duties, and would be provided with government materials and equipment and the assistance of government personnel (Pet. App. 19; Appellees' App. 52). For approximately nine months, they devoted substantially all of their duty hours and some of their leisure time to the construction of the statue (Appellees' App. 8, 42, 52).

During all stages of construction, the Army supplied the necessary physical facilities, materials, equipment and skilled and unskilled assistance (Appellees' App. 16–34, 55; Ex. 8). In the design stages, the Army supplied the live models required by the sculptor as well as the photographers who took the necessary pictures of the models (Appellees' App. 16, 17, 20). In the actual construction of the statue, the Army supplied the full-time services of two soldiers

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had been a professional sculptor and neither had sold any pieces of sculpture (Appellees' App. 42–43, 48, 49). At Fort Dix, both men were classified as illustrators and assigned to the preparation of visual aids for use in the post's schools (Appellees' App. 6, 7, 44, 45).

with previous sculpting experience (Appellees' App. 21–24, 52–54), the services of four or five machinists, three or four carpenters and one or two masons (Appellees' App. 24, 25, 60). It also contributed heavy equipment, the necessary operators, and unskilled labor (Appellees' App. 31, 32). At all stages, the petitioners were accountable to their military superiors, to whom they submitted written reports (Appellees' App. 12, 25, 26, 42, 61, 62). At one point in the work, General Heintges directed a change in the facial appearance of the statue, which then looked like a self-portrait of the sculptor (Appellees' App. 53). The total cost of the project in Army goods and services was $12,367.90 (Appellees' App. 17–20; Ex. 8).[3] Petitioners had devoted approximately 1,952 duty hours (and occasional off-duty time) to the project (Appellees' App. 21, 23; Ex. 8).

The finished statue consists of a 12 foot figure of a charging infantryman in full battle dress, with rifle thrust forward, with a field pack on his back, and with a bayonet, sheath, a shovel, canteen, hand grenades, and other implements attached to a cartridge belt supported by suspenders (Exs. 10, 12, C). He stands upon a pile of rocks about 3 feet high which, in turn, is set

[3] Petitioner's only expenses were estimated at less than $25.00 each for tools and books. It has never been claimed that reimbursement for these expenses, if requested, could not have been obtained (Appellees' App. 42, 56).

During the course of the project, Scherr kept a diary (Ex. 1). The Army's estimated total cost, $12,367.90, was based in part on the entries in this diary. The Army estimate (Ex. 8) was conceded by Scherr to be "basically accurate." (Appellees' App. 19–20.)

upon a 12 foot base (Appellees' App. 16; Exs. 10, 12). On the base are two plaques. The larger of them gives the work's title: "The Ultimate Weapon, the only indispensable instrument of war, the fighting man" (Appellees' App. 36, 37). The smaller plaque bears the names of petitioners and two of their assistants (Appellees' App. 37). Neither plaque bears any copyright notice.

Although petitioner Scherr had told an Army legal officer shortly after the unveiling of the statue that he had no copyright (Appellees' App. 39–41), petitioners did affix a notice of copyright to the statue prior to the unveiling (Appellees' App. 35, 36). Fearing they would encounter difficulties if the Army became aware of their copyright claim, they purposely placed the notice on top of the soldier's pack, where it could not be detected from the ground (Appellees' App. 38–39, 41, 62, 63).[4] About three months after the unveiling, they registered their claim of copyright with the Register of Copyrights.[5]

Petitioners' complaint filed in the district court sought an injunction against further infringement, or, in lieu thereof, damages of $10.00 for each infringing copy. Respondents Universal and the United

[4] The notice affixed by petitioners contains a letter C enclosed within a circle; the names Stuart Scherr and Steven Goodman; and the date, 1959 (see Exs. C, 10, 12).

[5] While the statue is modelled after the smaller clay piece, petitioners concede that the larger statue is a wholly different work of art and not merely an enlargement of the smaller figure (Appellees' App. 42, 52). Moreover, petitioners never attempted to secure a copyright for their original clay model. Their claim of infringement rests solely upon whether they possess an effective copyright in the finished statue.

States raised essentially three defenses to the copyright claim: (1) the statue was a "publication of the United States Government" and hence not copyrightable under 17 U.S.C. 8; (2) the notice of copyright was inadequate; and (3) the ownership of any copyright interest in the statue belonged to the United States, and not to petitioners, because the statue was built in the course of petitioners' Army employment.

On September 18, 1967, the district court granted summary judgment for the defendants, holding, *inter alia*, that the statue was a work "made for hire" within the meaning of 17 U.S.C. 26 and that any copyright interest was properly in the United States (Pet. App. 24–35). The court of appeals affirmed on the same ground, ruling that "if any copyright interest exists, it is the exclusive property of the United States Government" (Pet. App. 15).[6] Judge Friendly dissented, expressing the view that the case should be remanded to determine if petitioners were estopped to assert a copyright; he noted that this is an "unusual case," and that "facts like these may be unlikely to recur" (Pet. App. 19).

ARGUMENT

The decision of the Second Circuit is correct. It does not conflict with any other appellate court decision, and involves an "unusual" dispute "unlikely to

[6] Thus, the court of appeals did not decide whether the district court was also correct in granting summary judgment on the additional ground that the notice of copyright was inadequate (Pet. App. 15). Nor did it pass on the third defense that the statue was a government publication under 17 U.S.C. 8.

recur." Accordingly, review in this Court is not warranted, and the petition should be denied.

1. For petitioners to prevail, they must be the "authors or proprietors" of the statue (17 U.S.C. 9). But, where, as here, the statue was commissioned by the United States and designed and constructed by its employees, during regular duty hours, the work is "made for hire" and the copyright belongs to the United States. 17 U.S.C. 26. See *Electronic Pub. Co.* v. *Zalytron Tube Corp.*, 376 F. 2d 592 (C.A. 2); *Donaldson Pub. Co.* v. *Bregman, Vocco & Conn, Inc.*, 375 F. 2d 639 (C.A. 2), certiorari denied, 389 U.S. 1036; *Brattleboro Pub. Co.* v. *Winmill Pub. Corp.*, 369 F. 2d 565 (C.A. 2); *Yardley* v. *Houghton Mifflin Corp.*, 108 F. 2d 28 (C.A. 2), certiorari denied, 309 U.S. 686; *Sawyer* v. *Crowell Pub. Co.*, 46 F. Supp. 471 (S.D. N.Y.), affirmed, 142 F. 2d 497 (C.A. 2), certiorari denied, 323 U.S. 735.

There can be no real question that the statue was a work "made for hire". Petitioners created the statue under orders, for a government purpose, at government expense, using government materials, facilities and other government personnel, and under the supervision of their commanding officers. (Appellants' App. 16-34, 55; Ex. 8). Thus, this is not the case of a privately prepared work of a government employee undertaken for entirely personal reasons in off-duty hours. Compare *Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262 (C.A.D.C.), reversed *per curiam* on other grounds, 369 U.S. 111; on remand, 268 F. Supp. 444

(D. D.C.). The United States is entitled to the same right that any private employer would have in the works of its employees.

2. Petitioners contend that the United States can never obtain any rights in the artistic work of servicemen conscripted into the military service, even though the work is for a public purpose and the government has contributed all of the labor and materials and has borne the expense (Pet. 7–9). But the fact that petitioners were conscripted into the Army does not in any way nullify their employment status. Moreover, as the court below noted, petitioners "were not required to engage in the work they did in order to fulfill their military obligations; they did so voluntarily * * * and welcomed the opportunity to be engaged in work more akin to their artistic talents" (Pet. App. 19). In light of these factors, petitioners are not entitled to claim the statue as their exclusive property.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970